Nos. 87-963, 87-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT L. HERNANDEZ,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
Respondent

KATHERINE JEAN GRAHAM,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE,
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On Writs of Certiorari to the United States Courts of Appeals for the First and Ninth Circuits

BRIEF OF THE AMERICAN JEWISH CONGRESS AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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Pursuant to Rule 36.2 of the Rules of this Court, the American Jewish Congress files this brief *amicus curiae* in the above-entitled cases which have been consolidated for argument. The brief supports the position of the petitioners. The American Jewish Congress has filed with the Clerk of the Court the written consents of all parties to the cases.

STATEMENT OF INTEREST

The American Jewish Congress was established in 1918 to uphold the principles of democracy and the religious, civil, political and economic rights of Jews and others. Since its inception, the American Jewish Congress has undertaken, in

accordance with the First Amendment, to support the principle of free exercise of religion and to oppose governmental actions which tend to establish religion.

The National Jewish Community Relations Advisory Council is the national planning and coordinating body for the field of Jewish community relations, and its following national member agencies: B'nai B'rith International, American Jewish Congress, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America, Women's League for Conservative Judaism, Women's American ORT; and the 114 community member agencies representing all major Jewish communities throughout the United States. These communities are listed in Appendix A.

The Jewish community, through the actions of its representative agencies and through the National Jewish Community Relations Advisory Council, is committed to the preservation and protection of a vigorous non-governmental sector as well as the freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses.

In particular, *amici* are interested in maintaining equal treatment under the law for all religions. That interest has led *amici* to file this brief in support of the petitioners Hernandez and Graham even though they believe that the stipulation that the Scientology Church is a legitimate religion may be erroneous. *See Church of Scientology of California* v. *Commissioner*, 823 F.2d 1310 (9th Cir. 1987). Nevertheless, they believe the stipulation is controlling for the cases before the Court. Notwithstanding their distaste for the Scientology Church, *amici* believe that the legal standards enunciated by the Courts below are a threat generally to all bona fide religious groups.

The cases before the Court present important issues under the Internal Revenue Code and under the Constitution of

the United States with respect to the deductibility of contributions to religious organizations for participation in religious services. The Courts of Appeals below have held that payments made for participation in particular religious services, pursuant to a schedule of payments fixed by the church in question, represent contributions which are nondeductible under section 170 of the Internal Revenue Code. They have reached this conclusion because they believe that the religious services and benefits secured by these contributions represented a "quid pro quo," and that the religious services were equal in value to the amount of the monetary contributions.

In the *Hernandez* case, the Court also held that the denial of deductions was not a significant or inappropriate burden on the free exercise of religion. In the *Graham* case, the Court held that the denial of deductions was necessary because of the overwhelming importance of maintaining a "sound and uniform tax system."

The decisions of the Courts below contradict rulings of the Internal Revenue Service, and practice thereunder, which have prevailed without question for more than seventy years. The rulings recognize the deductibility of contributions to churches, in the form of amounts specified by those churches to be paid for pews, assessments, and dues. The original ruling in 1919 (A.R.M. 2, 1 C.B. 150), which has been reiterated in rulings over the intervening years, was a contemporaneous construction of the deduction provisions contained in the predecessor section to section 170 of the Internal Revenue Code.

If allowed to stand, the decisions below would put into question the deductibility of contributions for a wide range of religious services and contradict the favorable rulings outstanding on the deductibility of such contributions.[1] These contributions include amounts paid for participation

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[1] *See Hernandez* v. *Commissioner*, 819 F.2d 1212, 1227 (1st Cir. 1987); *Graham* v. *Commissioner*, 822 F.2d 844, 850 (9th Cir. 1987); *Foley* v. *Commissioner*, 844 F.2d 94, 97-99 (2d Cir. 1988) (Newman, J., dissenting); *Christensen* v. *Commissioner*, 843 F.2d 418, 421 (10th Cir. 1988) Seymour, J., dissenting).

in Jewish High Holy Day services (Yom Kippur and Rosh Hashanah) and a variety of contributions to other churches. For example, they put in question the deductibility of tithing contributions to the Mormon Church, as well as Church-specified support payments for Mormon missionaries. Similarly, they raise serious questions as to the deductibility of payments for pews in Protestant Churches and any other dues or assessments that may be made by those Churches. They challenge contributions for special Masses of the Catholic Church. In each of these situations, the argument may be made that a "quid pro quo" for monetary contributions has been provided in the form of religious benefits and services, and the contributor has received commensurate benefits for his money.

In the view of the American Jewish Congress and The National Jewish Community Relations Advisory Council, contributions to any church, whether in an amount determined solely by the contributor or an amount set by the church, in exchange for membership in a church or participation in religious services should remain deductible under section 170 of the Internal Revenue Code.

STATEMENT OF BASIC FACTS

Amici will not attempt to review the records of the cases before the Court. However, certain facts and conclusions of fact are so indisputable and fundamental that they virtually dictate the proper outcome of these cases. See *Staples* v. *Commissioner,* 821 F.2d 1324, 1325-26 (8th Cir. 1987). It has been stipulated, in the Tax Court trial of *Graham* v. *Commissioner,* 83 T.C. 575, 576 (1984), that the Church of Scientology is (i) a religious organization, (ii) a church within the meaning of section 170(b)(1)(A)(i), and (iii) a tax-exempt religious organization under sections 501(a) and (c)(3) and 170(c)(2) of the Internal Revenue Code. The stipulations on these matters were accepted in both Courts of Appeals below. *Hernandez* v. *Commissioner,* 819 F.2d 1212, 1216 (1st Cir. 1987); *Graham* v. *Commissioner,* 822 F.2d 844, 846 (9th Cir. 1987). It is also clear that the "auditing" process of the Church of Scientology is a core

religious practice of that Church. *See* Stip. 15-23; *Graham* v. *Commissioner,* 83 T.C. 575, 580-81 (1984); *Hernandez* v. *Commissioner,* 819 F.2d 1212, 1215 n.1 (1st Cir. 1987); *Graham* v. *Commissioner,* 822 F.2d 844, 846 (9th Cir. 1987); *Christensen* v. *Commissioner,* 843 F.2d 418, 419 (10th Cir. 1988). Finally, it is clear that the taxpayers' contributions for auditing participation were made directly to the Church of Scientology for its support and maintenance. Stip. 39, 53; *Graham* v. *Commissioner,* 83 T.C. 575, 580-81 (1984); *Staples* v. *Commissioner,* 821 F.2d 1324, 1325 (8th Cir. 1987); *Graham* v. *Commissioner,* 822 F.2d at 847. The parties in *Hernandez* also stipulated that a "petitioner's subjective intent" was not to be found as a fact in the cases. *Hernandez* v. *Commissioner,* 819 F.2d at 1215.

SUMMARY OF ARGUMENT

From the time of the earliest income tax acts more than seven decades ago to the present Internal Revenue Code, the income tax laws have recognized the tax-exempt status of religious organizations and the deductibility of contributions, in whatever form, to religious organizations. Almost at the inception of this exemption and deduction legislation, the Internal Revenue Service ruled that contributions in amounts determined by either the payor or the church were fully deductible. The original ruling has been reiterated in more recent rulings, and deductions for contributions for the benefit of churches have been consistently claimed by contributors and allowed by the Service. If a change is now to be made in the established law and practice, it should be made by Congress, and not as the result of an *ad hoc* litigating position of the Internal Revenue Service, without even a declared reversal of published rulings which contradict that litigating position.

No economic "market" exists for religious services or for participation in religious rites and ceremonies. No monetary, commercial, economic or financial benefit or offset accrues to the contributor-participant in the form of such religious services. To the contrary, participation in religious

matters is, by definition, nonsecular, spiritual and intangible, and both the Service and the courts have heretofore so held. It confounds American principles, and is almost absurd, to attempt to value religious services as the "quo" to the "quid" of monetary contributions. Nor does it make sense to attempt to value religious benefits, in exchange for contributions, by and at precisely the amounts contributed. The syllogisms of the Courts below are founded on erroneous premises and misleading tautologies.

However invidious the beliefs and practices of the Church of Scientology may appear to many, the principles stated above apply equally to it as to any other religion. This is a direct consequence of the several controlling stipulations of the parties in the Tax Court below. The Courts of Appeal cannot, as a matter of law, undermine the stipulations and undisputed factual determinations by substituting their own conclusions in lieu thereof. For example, *Graham* v. *Commissioner,* 822 F.2d 844, 847, apparently endorses the Tax Court's finding that the goal of the Church of Scientology is "making money." But if, as *stipulated,* the Church of Scientology is a tax-exempt religious entity, its "goal" plainly is not "making money" any more than making money is the goal of the Catholic Church, Jewish Synagogues, Protestant Denominations and Buddhist Temples.

A purported reliance on the *American Bar Endowment* case (*United States* v. *American Bar Endowment,* 477 U.S. 105 (1986)) by the Courts below misses the obvious and controlling distinctions between that case and the cases here. *American Bar Endowment* involved the purchase of insurance, which is a commercial and financial commodity directly susceptible to market valuation. That case held simply that the difference between the "wholesale" price (after taking into account the receipt of dividends) for insurance paid by the Endowment and the market price paid by the insured was not a charitable contribution. The purchaser personally got *full market value* for his money. In no sense, except the most cynical, can religious participation

and practice be compared to the purchase of marketable insurance.

The analyses of the Courts below are basically faulty in that they stress, and attempt to measure, alleged economic "benefits" to the individual contributors, whereas the traditional and accepted standard has been to allow deductions whenever the contributions favored or benefited the *church or religious entity* involved. Long before he wrote the opinion in the *Hernandez* case, which examines the contributor's motives and benefits received, the same Judge of the First Circuit Court of Appeals cogently (but inconsistently with the approach in the *Hernandez* opinion) observed:

> Were the deductibility of a contribution under section 170(c) of the Internal Revenue Code of 1954 to depend on "detached and disinterested generosity," an important area of tax law would become a mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality.
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> * * *
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> If the policy of the income tax laws favoring charitable contributions is to be effectively carried out, there is good reason to avoid unnecessary intrusions of subjective judgments as to what prompts the financial support of the organized but non-governmental good works of society.

Crosby Valve & Gauge Company v. *Commissioner,* 380 F.2d 146, 146-47 (1st Cir. 1967), *cert. denied,* 389 U.S. 976 (1967). A charitable contribution is determined by examining the benefit received by a qualifying organization which meets the community, civic and charitable standards for tax exemption under sections 501(c)(3) and 170(c), not by the subjective intent of a particular donor, or by an intangible benefit to the donor that is measured only by the very dollars given.

The decisions below, although particular to the Church of Scientology, threaten the deductibility of contributions to all religions, because all religious participants derive a "benefit"

from their religious engagement. On the logic propounded by the Courts below, contributors in the case of *every* contribution to their churches receive a "quid pro quo" for their contributions. Therefore, there will never be a *net* contribution to be deducted by the contributor. This logic is, however, a great deal less than compelling.

While the Courts below deny that their conclusions significantly burden the First Amendment "free exercise" of the Scientology religion, the specific application of new criteria only to the Church of Scientology, after consistent law and practice to the contrary for other religions presently and over many decades, violates both the First Amendment religious clauses and equal protection under the Fifth Amendment. If nothing else, the audit and fact-finding process used by the IRS in these very cases also involves exactly that "excessive entanglement" in religious matters which the Constitution prohibits.

If deductions for religious contributions are to be eliminated, this is a matter for Congress, not to be left to sporadic litigating forays of the Internal Revenue Service or even to the predilections of the courts. The decisions below should be reversed.

ARGUMENT

I. CONTRIBUTIONS IN WHATEVER FORM IN SUPPORT OF RELIGIOUS ENTITIES ARE DEDUCTIBLE AND HAVE BEEN DEDUCTIBLE FOR MORE THAN SEVEN DECADES; THE SPIRITUAL BENEFITS FROM RELIGIOUS PARTICIPATION RECEIVED BY CONTRIBUTORS DO NOT NULLIFY OR OFFSET THESE DEDUCTIONS

The Internal Revenue Code and published rulings of the Internal Revenue Service provide for the deduction of contributions or gifts to an entity organized and operated exclusively for religious purposes. Sec. 170(a), (c)(2); A.R.M. 2, 1 C.B. 150 (1919); Rev. Rul. 70-47, 1970-1 C.B. 49. The cases below involve nothing more than contributions to entities

organized and operated exclusively for religious purposes. On the face of the statute and rulings, the contributions in question are deductible.

In 1913 Congress enacted the legislation which provided for an income tax exemption for religious organizations. Act (Tariff and Revenue) of Oct. 3, 1913, ch. 16 § IIG, 38 Stat. 172. During World War I, Congress enacted the War Revenue Act of 1917 which contained a predecessor section to section 170 of the present Internal Revenue Code, providing for the deduction of contributions or gifts to a religious organization. War Revenue Act of 1917, ch. 63, § 1201(2), 40 Stat. 330. As this Court has noted, the "plain language of section 170 reveals that Congress' objective was to employ tax exemptions and deductions to promote certain *charitable* purposes" (emphasis in original). *Bob Jones University* v. *United States,* 461 U.S. 574, 581, n.11 (1983).[2]

Two years after the enactment of the charitable deduction provision, in 1919, the Internal Revenue Service ruled:

> The distinction of pew rents, assessments, church dues and the like from basket collections is hardly warranted by the act. The act reads "contributions" and "gifts." It is felt that all of these come within the two terms.
>
> In substance it is believed that these are simply methods of contributing although in form they may vary.

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[2] There is little question that the Code broadly reflects special consideration for religion; it is not just one more form of charitable organization. Over the seven decades since the tax exemption and the deductibility of contributions were established, a host of favorable provisions for churches and religious organizations and persons was added to the Internal Revenue Code. Some of these provisions took the form of exemptions from taxes. *See* Internal Revenue Code sections 504(c), 512(b)(14), 514(b)(3)(E), 1402(e), 2055(a)(2), 2106(a)(2)(A)(ii), 2522(a)(2), 3401(a)(9), and 4975(g)(3). (All references hereafter are to the Internal Revenue Code unless otherwise indicated.) Other provisions gave special elections to religion. Sections 403(b)(1)(D), (2)(C), 410(d), 415(c)(4), 6057(c). Still others provided for exemptions from general reporting requirements applicable to other entities (including other charitable entities). Sections 6033(a)(2), 6043(b)(2), 7605(c) and 7611.

The Service rationalized:

> Is a basket collection given involuntarily to be distinguished from an envelope system, the latter being regarded as "dues"? . . . It is believed that the real intent is to contribute and not to hire a seat or a pew for personal accommodation. A.R.M. 2, 1 C.B. 150 (1919).

Some fifty years later, the Service reiterated this ruling:

> Pew rents, building fund assessments and periodic dues paid to a church . . . are all methods of making contributions to the church and such payments are deductible as charitable contributions. Rev. Rul. 70-47, 1970-1 C.B. 49.

The Service has also recognized in another ruling that a genealogical research organization for a particular family may be tax-exempt as a religious entity under section 501(c)(3) because it served a religious purpose in the particular case and contributed to the "general public benefit." Rev. Rul. 71-580, 1971-2 C.B. 235. The Service has ruled that a specific bequest to cause Masses to be said for deceased family members is deductible as a charitable bequest for estate tax purposes. Rev. Rul. 78-366, 1978-2 C.B. 241. In still another ruling, the Service sustained the deductibility of membership fees paid to charitable organizations where the rights and privileges of membership "are incidental to making the organization function according to its charitable purposes . . . ." However, if membership carries with it "significant return benefits that have a *monetary* value," the deduction must be offset by such value. Rev. Rul. 68-432, 1968-2 C.B. 104 (emphasis added).[3] Revenue Ruling 76-185, 1976-1 C.B. 60, hammered home the rule that a contribution is deductible if the contributor does not receive a *financial* or *economic* benefit commensurate with money contributed. These rulings demonstrate that incidental or noneconomic return benefits to a contributor will not affect or diminish the deductibility of contributions.

[3] For example, concerts or lectures provided for contributions may reduce deductions by the monetary market value of the concerts or lectures.

In a limited number of cases the courts have further interpreted section 170 in a manner supporting the position of the IRS declared seventy years ago. The Tax Court has permitted the deduction of rehabilitation and repair expenses incurred to maintain a chapel that was a part of real estate owned by the contributor but was used as a parish church by the community. The court held that the scope of a charitable contribution was not to be "narrowly construed" and interpreted section 170(c) as placing its "emphasis on the character of the charitable donee and on the nature of the activities for which the contribution is made" rather than on the benefit to the contributor-owner of the property. *Estate of Philip A. Carroll,* 38 T.C. 868, 873-74 (1962). In the case of *White* v. *United States,* 725 F.2d 1269 (10th Cir. 1984), the Court of Appeals held that payments of transportation expenses and living expenses of a family member who served as a Mormon missionary were amounts deductible by the payor. The Court considered that the test was one of benefit to the church rather than to the payor or the family member. In that case payments were made directly to the family member in amounts set by the church.

The conclusions reached by the Courts below in the cases before this Court are directly at odds with the outstanding published rulings and judicial decisions cited above. Those conclusions have no basis either in the statute or regulations or in any other rulings of the Internal Revenue Service; they also lack judicial precedent as far as we can tell.

The Courts below placed controlling importance on the fact that the Church of Scientology set the fees paid for auditing. However, this is an irrelevant fact in light of the rulings and cases. Moreover it does not square with ordinary and customary definitions of the term "contribution" in English usage. The *Oxford English Dictionary,* Vol. I (Oxford 1971), provides a primary definition for "contribution" as the "action of contributing or giving as one's part to a common fund or stock." This authoritative dictionary makes it clear that contributions may be exacted or levied; they are essentially forms of transferring property from one

person to another. *Webster's Third New International Dictionary* (Merriam-Webster, Springfield, Massachusetts 1964), defines contributions primarily as a payment, tax or imposition, *i.e.*, "a payment imposed upon a body of persons . . . by civil . . . or *ecclesiastical* authority" (emphasis added). Similarly, *Black's Law Dictionary*, 297 (5th ed. 1979) defines "contribute" as to "lend assistance or aid, or give something to a common purpose; to have a share in any act or effect; to discharge a joint obligation." These usages lend no support whatever to the constructs of the Courts below.

More particularly, under section 170(a)(1) a deduction is allowed for "any charitable contribution." A charitable contribution is defined simply as a "contribution or gift to or for the use of . . ." an entity "organized and operated exclusively for religious . . . purposes." Section 170(c). The key statutory words are "contribution" *or alternatively* "gift." "Contribution" is not simply a synonym for "gift" even though the Courts below seem to equate the terms. We believe that the dictionary definitions of "contribution" are sound with respect to a church, synagogue or other religious organization. What is characteristic of the term when applied to these organizations is that contributions are jointly furnished by members or participants to support the organization. So used, "contribution" comports with both its dictionary meaning and the Service's interpretation in the rulings cited heretofore; thus, pew rentals, dues or building assessments involve contributions to joint funds for the support of the religious organization.

There is also nothing in section 170(c) or the case law heretofore that precludes a deduction for a charitable contribution simply because some intangible kind of benefit, is offered. This is particularly true if the benefit is religious, *i.e.*, spiritual rather than secular, economic and monetary. As the Tax Court has noted elsewhere, benefits from religious contributions are "merely incidental" to charitable benefits and "not significant return benefits that have a *monetary* value within the meaning of section 170"

(emphasis added). *Murphy* v. *Commissioner*, 54 T.C. 249, 253 (1970).

The Courts below erred in maintaining that religious services or benefits are measurable offsets to, or nullify, the charitable attributes of contributions. Both courts below concluded that fixed fees establish a "market" setting as distinguished from a "contribution" setting. Thus, in *Hernandez* v. *Commissioner*, 819 F.2d 1212, 1216, the Court noted that a payment is deductible "only if and to the extent it exceeds the market value of the benefit received." Similarly, a payment is not a contribution "if the return benefit is commensurate with the payment or if obtaining the benefit is reason for making the payment." *Id.* at 1219. In *Graham* v. *Commissioner*, 872 F.2d 844, 848, the Court observed that the "detached and disinterested motive" test is designed "to determine that no measurable, specific return comes to the payor as a quid pro quo for the deduction." The appropriate standard is to examine "the structure of the transaction, and not the type of benefit received." *Id.* at 849. The *Graham* Court finally observed that the value of the "quo" received by the taxpayers was easy to determine because the court need merely look to "the amount of money they were willing to pay for it in a market setting." *Id.* at 849-50. Unfortunately, the *Graham* Court failed altogether to indicate where the "market setting" for religious services was to be found. The phrase "market setting" more effectively camouflages than it elucidates the issue.

By focusing on the structure of the payments as an indication of an alleged market setting (and as providing proof of value), both Courts of Appeals enunciated standards which cannot be and have not been applied to payments for religious services. A market does not exist merely because a taxpayer has paid for religious services. Otherwise, all religious contributions could be nullified by "benefits" received in the "market" in the amount of payment simply by the fact of payment. The *Hernandez* decision requires that the taxpayer must prove that the payment exceeded the "return benefit," in which event the excess would be deductible. However, in the case of payments for religious services, the

taxpayer can never meet this burden of proof because there is no way to value religious services realistically, except by the kind of bootstrapping engaged in below. *Cf. Crosby Valve and Gauge Company* v. *Commissioner,* 380 F.2d 146, 146-47 (1st Cir.), *cert. denied,* 389 U.S. 976 (1967).

The Courts of Appeals below have engaged in reasoning that is clearly circular or tautological when they point to the taxpayer's payment as proof of value received in the form of religious services, where such services have no recognizable money or money equivalent value apart from the amount that the payor has paid. Religious participants do not shop for religious services based on the prices which churches, temples or synagogues may offer. Catholics do not attend Protestant churches because pew seats are cheap. Jews do not attend services in Buddhist temples that offer religious services with little or no fees. Neither Catholics nor Jews shop for the least expensive church or synagogue of their own religion. What the religious participant "buys" is a religious service of his belief and choice, and no administrative agency or court of the federal government can set a price for the spiritual benefit.

Finally, as the IRS's own rulings make very clear, a market for religious services does not arise because the structure and amount of the payments is predetermined by the church. Fixed fees only mean that the amount contributed to the church, within the meaning of section 170, is set by it, not the contributor. This does not cause a contribution, in whatever form, to be something other than a contribution. A.R.M. 2, *supra.* Rev. Rul. 68-432, *supra.*

The Courts below, including the Tax Court, delineated in great detail the accounting, bookkeeping and money practices of the Church of Scientology. These matters, however, have nothing to do with the cases. They serve only to cloud the controlling stipulations that the Church of Scientology is a religion and that "auditing" is a religious service. If they are intended to suggest that by practices of discounts and refunds the Church has established a commercial business, the observations contradict the stipulations. As the Court of

Appeals in the case of *Staples* v. *Commissioner,* 821 F.2d 1324, 1325-26 (8th Cir. 1987) discussed the contradiction—

> This court is bound to treat as conclusive and to enforce all fairly made and voluntary stipulations of fact. *Skeets* v. *Johnson,* 816 F.2d 1213, 1215 (8th Cir. 1987) (en banc). The tax court in *Graham,* we believe, ignored the fair impact of the government's stipulations. For example, the court observed—contrary to the stipulation that Scientology is a qualified church—that "[t]he Church of Scientology operates in a commercial manner in providing these religious services. In fact, one of its articulated goals is to make money."
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> * * *
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> The stipulations, however, require that the religious nature of the Scientology activities at issue in these cases be recognized; *Graham* thus amounts to a holding that the deductibility under section 170 of payments relative to participation in bona fide religious practices will depend on the mechanism adopted by the church to solicit support from its members. Neither the tax court nor the government has cited a case in which a taxpayer has been denied a deduction for payments keyed to participation in strictly religious practices.

While the Church as a religious organization has a strong interest in money support, this is not peculiar to Scientology. All religious institutions must maintain religious personnel, buildings, and meet the expenses involved in religious services and general maintenance. No church or synagogue is oblivious to the need to secure funds.

In summary, the decisions below are unsound as a matter of English usage, the literal terms of the statute, legal and tax history, IRS rulings, case law, and logical assumptions. Religious services are not economic commodities measurable in dollars. Nor are they purchased in the marketplace.

II. A CONTEMPORANEOUS INTERPRETATION OF THE DEDUCTION PROVISIONS OF SECTION 170 BY THE IRS, SANCTIONED HERETOFORE BY THE COURTS AND APPLIED FOR MORE THAN SEVENTY YEARS, CANNOT BE OVERTURNED SIMPLY BY THE EXERCISE OF NEW LOGIC

This Court and almost every court that has considered the matter has repeatedly recognized that a contemporaneous interpretation of income tax laws by the Internal Revenue Service is entitled to great weight. Decades of practice following such interpretation cannot be overturned simply by the exercise of new, refined and sophisticated logic.

As Justice Holmes observed in an oft-quoted and meaningful dictum long ago, "a page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner* 256 U.S. 345, 349 (1921). More recently, in discussing the reach and policy of tax exemption, Chief Justice Burger emphasized the difference between "logical analysis" and "sensible and realistic" legal interpretations in the light of history, leaving little doubt as to his preference. *Walz* v. *Tax Commission,* 397 U.S. 664, 671 (1970). Justice Brennan made the same point perhaps even more strongly: "History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemption from the earliest days as a Nation. Rarely, if ever, has this Court considered the constitutionality of a practice for which the historic support is so overwhelming." *Walz* v. *Tax Commission, op. cit.* at 681 (concurring opinion).

Amici have called the Court's attention to the outstanding unrevoked rulings of the Internal Revenue Service on the matters at issue in these cases. The long-stated policy of the Internal Revenue Service is that taxpayers may generally rely on published revenue rulings. As set forth in Revenue Procedure 78-24, 1978-2 C.B. 503, 504-05:

> Revenue rulings . . . are published for the information and guidance of taxpayers, Service officials and others concerned.

Id. at 3.01.

* * *

> Taxpayers generally may rely upon revenue rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling to the facts of their particular cases.

Id. at § 7.01(5).[4]

Under the income tax law, a long-standing administrative interpretation which applies to a substantially re-enacted statute is deemed to have received congressional approval, giving it the effect of law. *Commissioner* v. *Noel Estate,* 380 U.S. 678, 682 (1965) (regulations in effect for 36 years); *see also United States* v. *Correll,* 389 U.S. 299, 305-06 (1967); *Helvering* v. *Winmill,* 305 U.S. 79, 83 (1938) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law"); *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583 (1930); *Lykes* v. *United States,* 343 U.S. 118, 127 (1952).

The case of *Ostheimer* v. *United States,* 264 F.2d 789 (3d Cir.), *cert. denied,* 361 U.S. 818 (1959), is particularly analogous to the cases before the Court. In that case a 1915 ruling was reaffirmed in 1932 and 1955. In deciding that such administrative interpretations were "of great persuasion in deciding an issue of statutory construction," the Court declared that "'[a]n administrative interpretation such as this, so consistently followed over a long period of time, is entitled to great weight with the Court and there is a heavy burden upon the plaintiff to show that it is erroneous.'" *Id.* at 793. For the reasons stated above, the outstanding rulings of the Internal Revenue Service were and are plainly correct, not in error at all; the new logic of the Courts below reflects no necessary transformation of the law and does not

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[4] *See also* Rev. Proc. 72-1, 1972-1 C.B. 693; Rev. Proc. 69-1, 1969-1 C.B. 381; Rev. Proc. 62-28, 1962-2 C.B. 496; Rev. Rul. 54-172, 1954-1 C.B. 394.

represent that "great weight" needed to overcome historic "error."

In *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956), this Court upheld the Treasury's "prior long-standing and consistent administrative interpretation" and rejected the Commissioner's later construction of a tax statute:

> [A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. . . . The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new.

(quoting Justice Cardozo in *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 315 (1933)); *see also Central Illinois Public Service Company* v. *United States*, 435 U.S. 21 (1978).

In an opinion by Justice White announced as recently as June 6, 1988, the majority of this Court noted that Congress' failure to disturb a consistent judicial interpretation of a statute indicates "that Congress at least acquiesces in, and apparently affirms, that [interpretation]," *Monessen Southwestern Railway Company* v. *Morgan*, ____ U.S. ____, 56 U.S.L.W. 4494, 4496, (1988) (quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 703 (1979)). There the federal and state courts had—

> "held with virtual unanimity over more than seven decades that prejudgment interest is not available under the FELA" . . . Congress has amended FELA on several occasions since 1908. . . . Yet, Congress has never attempted to amend the FELA to provide for prejudgment interest. We are unwilling in the face of such congressional inaction to alter the long-standing apportionment between carrier and worker of the costs of railroading injuries. If prejudgment interest is to be available under the FELA, then Congress must expressly so provide" (footnotes and citations omitted).

The doctrine that a statutory construction and interpretation which has been applied for a long time cannot be readily overturned by new logic receives even more weight when the interpretation was rendered contemporaneously with the statute, as is the case here. *Fawcus Machine Co.* v. *United States*, 282 U.S. 375 (1931), sets forth the view that contemporaneous administrative construction of a statute represents the proper interpretation of the statute and congressional intent. In that case the Court found that earlier regulations, a "contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons." *Id.* at 378. *See also Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *United Shoe Machinery Corp.* v. *White*, 13 F. Supp. 97, 101 (D. Mass. 1935), *aff'd in part and rev'd in part on other grounds*, 89 F.2d 363 (1st Cir.), *cert. denied*, 302 U.S. 768 (1937).

Given the long-standing and consistent treatment of church membership dues and pew rents as charitable contribution deductions, the courts should defer to the legislative branch the decision whether to change the historic meaning of "charitable contributions" to religious institutions. "The primary responsibility for determining what should be included and excluded from income for tax purposes rests with Congress. If inequities result from the present method . . ., resort should be had to the legislative branch of the Government for appropriate relief." *Farmers Cooperative Co.* v. *Commissioner*, 288 F.2d 315, 324 (8th Cir. 1961) (consistent IRS ruling for over forty years).

In *Parks* v. *Commissioner*, 686 F.2d 408 (6th Cir. 1982), the Court rejected the Commissioner's request that the Court overturn a decision (*Dean* v. *Commissioner*, 35 T.C. 1083 (1961)), which treated a close corporation's interest-free loan to the taxpayer as excludable from the taxpayer's gross income. While the court found some merit in the Commissioner's argument for constructive income, the Court said the decision had been law for over twenty years

and had been relied upon by the taxpayers, and any change should be made by the legislature:

> A well-entrenched interpretation of tax law, even if logically assailable, should be changed by Congress, not the courts. The Supreme Court stated this principle as follows: "Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences."

Id. at 409 (quoting *United States* v. *Byrum*, 408 U.S. 125, 135 (1972)); *see also, Hardee* v. *United States*, 708 F.2d 661, 668 (Fed. Cir. 1983).

In deciding a parallel Scientology case also coming up from the Tax Court's *Graham* case, the Eighth Circuit Court of Appeals has held in *Staples* v. *Commissioner*, 821 F.2d 1324, 1327 (1987)—

> . . . regardless of the timing of the payment or details of the church's method of soliciting contributions from its members, an amount remitted to a qualified church with no return other than participation in strictly spiritual and doctrinal religious practices is a contribution within the meaning of section 170.

The Service took this position more than seventy years ago. The interpretation then has lost none of its sense now. After the passage of many decades, a change in this law is a matter for Congress.

III. THE DECISIONS BELOW SERIOUSLY BURDEN THE FREE EXERCISE OF RELIGION BY SCIENTOLOGISTS BY DISCRIMINATING AGAINST THE CHURCH OF SCIENTOLOGY. IN SO DOING, THE DECISIONS VIOLATE THE FIRST AND FIFTH AMENDMENTS TO THE CONSTITUTION

The decisions below, and the actions of the Internal Revenue Service in pressing for those decisions in the face of outstanding contrary published rulings, discriminate against

the Church of Scientology. Accordingly, those decisions and actions violate the "free exercise" clause of the First Amendment and the "equal protection" clause of the Fifth Amendment. Furthermore, the kind of examinations conducted and evidence introduced by the Respondent in the trial record represents a clear example of that "excessive entanglement" in religious affairs which this Court has long disfavored and prohibited under the First Amendment.

The rulings of the Service (A.R.M. 2 and Rev. Rul. 70-47 in particular) recognize that religionists are entitled to deduct payments to churches notwithstanding that those churches specify the amounts to be paid for religious services and privileges. This is denied to contributors to the Church of Scientology by the decisions below.

The *Hernandez* Court recognized the discrimination indirectly (although denying it explicitly) when it observed that Revenue Ruling 70-47 might be wrong. 819 F.2d at 1227. The Court there started to distinguish the situations in the Revenue Ruling from that of Scientology by referring to the Internal Revenue Service view that "collective worship" is different from religious service of an "individualized nature." However, the Court found this distinction "irrelevant," and reverted simply to its position that a "mandatory price" destroyed the deduction. *Id.* This hardly suffices, for it leaves the discrimination intact: no deduction to Scientologists for "mandatory" contributions to the Church of Scientology; deductions to other taxpayers for "mandatory" contributions to their religions.

The *Graham* Court of Appeals also had "doubt the taxpayers have shown a burden on the right of free exercise." The Court noted "Any tax reduces the amount of money available to support the taxpayer's religion." 822 F.2d 844, 851. Notwithstanding some concern that its analysis was sound, the *Graham* Court found adequate reassurance for its view in the overriding governmental interest in "the maintenance of a sound and uniform tax system," (*id.* at 852) and in a "neutral and enforceable taxation system" (*id.* at 853). What was overlooked in the *Graham* opinion was the taxing of "mandatory" contributions to Scientologists while

allowing deductions under the rulings for every variety of "mandatory" contributions to other churches. This is hardly the maintenance of a "neutral" and "uniform" taxing system.

In terms of the burden imposed on free exercise, we may start with the well-known dictum of *McCullough* v. *The State of Maryland,* 4 Wheat. 316, 431 (1819), "That the power to tax involves the power to destroy." This Court has further noted, in the case of *Speiser* v. *Randall,* 357 U.S. 513, 518 (1958), that "speech can be effectively limited by the exercise of the taxing power." There should be little doubt that the free exercise of religion can similarly be limited "by the exercise of the taxing power" in a discriminatory manner. *Cf. First Unitarian Church* v. *Los Angeles,* 357 U.S. 545 (1958). Rates of tax in recent decades have varied from approximately 20% to 90%. Denial of a deduction results in the application of such rates to the contributions. The result is undoubtedly burdensome where the rate applies in an unwarranted, discriminatory fashion.

Both Courts below, as a consequence of their treatment of religion as an economic commodity and singular discrimination against Scientology, failed to recognize governing principles which this Court has pronounced repeatedly. "Certainly government may not lay a tax on either worshipping or preaching." *Walz* v. *Tax Commission,* 397 U.S. 664, 706 (1970) (Douglas, J., dissenting). The laws must be applied "to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Id.* at 669 (majority opinion by Chief Justice Burger). The state "cannot make public business of religious worship or instructions, or of attendance at religious institutions of any character .... That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation...." Justice Black in *Everson* v. *Board of Education,* 330 U.S. 1, 26 (1947).

This Court has also made it clear that "excessive entanglement" in religious affairs, abjured by the First Amendment, will result from a "comprehensive, discriminating,

and continuing state surveillance." The state must accordingly avoid detailed examinations of religious activities, doctrines, and church records. *Lemon* v. *Kurtzman,* 403 U.S. 602, 619 (1971). The record in the Tax Court in these cases is replete with exactly these forms of constitutionally prohibited examination and entanglement. The recitations of factual detail in the opinions of both Courts of Appeals below expose the "pervasive monitoring of these church agencies by the secular authorities." *Id.* at 627 (Black, J., concurring); *cf. Hernandez* v. *Commissioner,* 819 F.2d 1212, 1215-19, 1222; *Graham* v. *Commissioner,* 822 F.2d 844, 846-47, 849.

The decision of the Internal Revenue Service generally to allow the deduction of contributions in whatever form to religious organizations but to disallow contributions to the Church of Scientology after a meticulous examination of the affairs, doctrines and records of that Church is a plain encroachment upon the free exercise of religion. We agree with petitioners that protection of all religious groups from the imposition of governmental orthodoxy by granting or denying tax benefits is compelled under the Constitutional religious clauses. Whether a church requires its parishioners to tithe, levies assessments on members, or sets a fixed fee or schedule of fees for participation in religious services is a matter for the church to decide. The methods used by religious organizations to solicit and collect funds necessary for their existence and well-being are not matters for state intervention. The government must not be able to tax disfavored forms of contribution to a disfavored religion.

CONCLUSION

The administrative agency charged with interpreting the income tax laws long ago held plainly and in essence that any form of contribution to a religious organization, irrespective of who determined the amount, was deductible. That ruling has been reiterated and reinforced for more than seventy years. Subsequent rulings have made it clear that deductions for contributions would be offset or reduced only by monetary values or market equivalents of monetary values provided to the contributors.

These interpretations over the decades have presently the force of law. They cannot be overturned by *ad hoc* judicial exercises of logic, which are premised on erroneous assumptions and standards as to the "monetary" value of religious services. Moreover, the administrators and courts may not dispense or deny tax deductions in a way which favors one religion and burdens another. The involvement of government in a detailed review, audit, examination and surveillance of church records, doctrines and practices is also Constitutionally prohibited.

The decisions below should be reversed.

Respectfully submitted,

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APPENDIX A

Birmington Jewish Community Council
Greater Phoenix Jewish Federation
Tucson Anti-Defamation—Community Relations Committee of the Jewish Community Council
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles Community Relations Committee of Jewish Federation-Council
Oakland Greater East Bay Jewish Community Relations Council
Orange County Jewish Federation
Sacramento Jewish Community Relations Council
San Diego Community Relations Committee of United Jewish Federation
San Francisco Jewish Community Relations Council
Greater San Jose Jewish Community Relations Council
Greater Bridgeport Jewish Federation
Greater Danbury Community Relations Committee of Jewish Federation
Greater Hartford Community Relations Committee of Jewish Federation
New Haven Jewish Federation
Eastern Connecticut Jewish Federation
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
Jewish Community Relations Council of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington Jewish Community Council
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Community Council
Greater Miami Jewish Federation
Greater Orlando Jewish Federation
Palm Beach County Jewish Federation
Pinellas County Jewish Federation

Sarasota Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metroplitan Chicago Public Affairs Committee of Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis Jewish Community Relations Council
South Bend Jewish Federation of St. Joseph Valley
Jewish Community Relations Council of Indiana
Greater Des Moines Jewish Federation
Louisville Jewish Community Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation—Community Council
Baltimore Jewish Community Relations Council
Metropolitan Boston Jewish Community Council
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit Jewish Community Council
Flint Jewish Federation
Minneapolis Minnesota and Dakotas Jewish Community Relations Council—Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis Jewish Community Relations Council
Omaha Jewish Community Relations Committee of Jewish Federation
Atlantic County Federation of Jewish Agencies
Bergen County Jewish Community Relations Council of United Jewish Community
Cherry Hill Jewish Community Relations Council of Southern New Jersey Jewish Federation
Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish Community Federation
Northern Middlesex County Jewish Federation
Raritan Valley Jewish Federation
Union Central New Jersey Jewish Federation
Wayne North Jersey Jewish Federation
Albuquerque Jewish Community Council
Greater Albany Jewish Federation
Binghamton Jewish Federation of Broome County
Brooklyn Jewish Community Council
Greater Buffalo Jewish Federation
Elmira Community Relations Committee of Jewish Welfare Fund
Greater Kingston Jewish Federation
New York Jewish Community Relations Council
Rochester Jewish Community Federation
Greater Schenectady Jewish Federation
Syracuse Jewish Federation
Utica Jewish Community Council
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati Jewish Community Relations Council
Cleveland Jewish Community Federation
Columbus Community Relations Committee of Jewish Federation
Greater Dayton Community Relations Committee of Jewish Federation
Toledo Community Relations Committee of Jewish Welfare Federation
Youngstown Jewish Community Relations Council of Jewish Federation
Oklahoma City Jewish Community Council
Tulsa Jewish Community Council
Portland Jewish Federation
Allentown Community Relations Committee of Jewish Federation
Erie Jewish Community Council

Greater Philadelphia Jewish Community Relations Council
Pittsburgh Community Relations Committee of United Jewish Federation
Scranton-Lackawanna Jewish Council
Greater Wilkes-Barre Jewish Federation
Providence Community Relations Committee of Rhode Island Jewish Federation
Charleston Jewish Community Relations Committee
Columbia Community Relations Committee of Jewish Welfare Federation
Memphis Jewish Community Relations Council
Nashville and Middle Tennessee Jewish Federation
Austin Jewish Community Council
Greater Dallas Jewish Community Relations Council of Jewish Federation
El Paso Jewish Community Relations Committee
Greater Houston Jewish Federation
Fort Worth Jewish Federation
San Antonio Jewish Community Relations Council of Jewish Federation
Newport News-Hampton Jewish Federation
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison Jewish Community Council
Milwaukee Jewish Council